Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1462

WHAT IT IS, INC. and
PEACHES PARLOR,

Petitioners,

vs.

MAYNARD JACKSON, MAYOR OF ATLANTA
and THE CITY OF ATLANTA,

Respondents.

WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

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OCTOBER TERM, 1978

NO. _____

WHAT IT IS, INC. and
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MAYNARD JACKSON, MAYOR OF ATLANTA
and THE CITY OF ATLANTA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on June 15, 1978.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 146 Ga. App. 574.

JURISDICTION

The judgment of Georgia Court of Appeals was entered on June 15, 1978. An application for rehearing was timely

filed and denied on July 5, 1978. Copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on September 19, 1978. Copy of said denial is set forth herein in Appendix C. A Motion for reconsideration was denied on October 16, 1978 as set out in Appendix D. The Court's jurisdiction is invoked under Title 28 United States Code §1257 (3).

QUESTIONS PRESENTED

I. Is the failure to provide appellate review for the revocation of a liquor license a violation of the equal protection and due process clause of the Fourteenth Amendment?

II. Does the lower court's holding that the hearing before the License Review Board, and the Mayor's decision to accept the recommendation of said board and revoke the liquor license, was not a judicial act violate equal protection of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

WHAT IT IS, INC., and PEACHES PARLOR, two night clubs, were notified by the Atlanta Police Department that due to alleged violation of State law and state liquor regulations, a hearing would be held before the License Review Board to revoke their liquor license. Petitioners filed several pre-trial motions, and after a pre-trial hearing a trial was had before the Board. The Board rendered a decision to the Mayor that the liquor

license be revoked. The Mayor approved the recommendation, and thereafter the Petitioners filed a Petition for Writ of Certiorari in the Fulton Superior Court. The Mayor filed an answer. At oral argument in the Fulton Superior Court, the City made an oral motion to dismiss on the grounds that the actions of the Mayor and the License Review Board was merely an administrative or executive function and not a judicial act. The trial judge granted the motion and dismissed the writ of certiorari. The Petitioners timely appealed to the Court of Appeals which affirmed the trial court, the Supreme Court of Georgia denied certiorari, and petitioners' petition for a writ of certiorari to this court.

REASONS FOR GRANTING THE WRIT

I. The failure to provide appellate review for the revocation of a liquor license denied the petitioners equal protection and due process of law.

A liquor license is a valuable property right, and due process requires certain procedural safeguards before this property right can be taken away. *Shapiro vs. Thompson*, 294 U.S. 618; *Goldberg vs. Kelley*, 397 U.S. 254; *Board of Regents vs. Roth*, 408 U.S. 564, *Perry vs. Sinderman*, 408 U.S. 593; and *Mathews vs. Eldridge*, 424 U.S. 319.

To protect the property rights of citizens the Georgia Administrative Procedure Act was passed. See Ga. Code Ann. §3A-1 et seq. Ga. Code Ann. §3A-120 provides a judicial review of any adverse ruling of any administrative agency. All state agencies come under this act and the exceptions are listed in Ga. Code Ann. 3A-102 (a). The regulations of a liquor license in an exception. Therefore, the State of Georgia has provided appellate review except for the regulation of a liquor license under present

law. This denies equal protection and due process of law.

In *Griffin vs. Illinois*, 351 U.S. 12, this court held that a state with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide means of affording adequate and effective appellate review to indigent defendants.

In *Burns vs. Ohio*, 360 U.S. 252, this court held that once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. See *Lane vs. Brown*, 372 U.S. 477 and *Draper vs. Washington*, 372 U.S. 487.

Applying the foregoing rules to the instant case, the petitioners were denied equal protection and due process of law.

An arbitrary and capricious act by the License Review Board and the Mayor affords petitioners no appellate review. At most the petitioners would have the burden of attempting to get an injunction against the revocation. During this time, they would be closed, and even if successful on an injunction action, they would have suffered irreparable injury.

This court recognized that the twenty-first amendment does not give the states the right to pass arbitrary and unconstitutional regulations involving liquor. *Craig vs. Boren*, 429 U.S. 190.

The State cannot establish regulatory schemes that work insidious discrimination that violate the Equal Protection Clause. *Moose Lodge vs. Irvis*, 407 U.S. 163.

The State legislature, by classification, has chosen to exempt the regulation of liquor from the Georgia Administrative Procedures Act, and thereby has denied the petitioners meaningful appellate review.

II. The lower Court's holding that the hearing before the License Review Board, and the Mayor's decision to accept the recommendation of said board, was not a judicial act violates equal protection of the law.

In *South View Cemetery Association vs. Hailey, Chairman, et al*, 199 Ga. 478, 480, the Court held that "the chief distinction between a legislative and judicial function is that the former sets uprights or inhibitions, usually general in nature; while the latter interprets, applies, and enforces existing law as related to subsequent acts of persons amenable thereto . . ."

The court further stated that,

"It has often been said in effect by various courts of the country that the basic distinction between administrative and judicial acts is that in the former case the law has prescribed and defined the duty to be performed with such precision and certainty as to leave no room for the exercise of judgment or discretion; whereas in the latter case the act to be done does involve the exercise of judgment or discretion". (See cases cited therein at page 480).

The Georgia Supreme Court has pointed out that the above rule does not apply as related to the acts of other officers and tribunals citing *Southeastern Greyhound Lines vs. Georgia Public Service Commission*, 181 Ga. 75, 77.

An executive officer "may find it necessary, advisable, and proper to acquaint himself with facts involved, but more often that not he should, and does, bring to bear in the performance of his administrative duties both judgment and discretion. But such an investigation, if any, is ex parte or voluntary, and the conclusion which his judg-

ment and discretion impels, and which is evidenced by his administrative act, does not take the form of a judgment between parties litigant after an orderly trial in accordance with judicial procedure. Thus it appears that the basic distinction between an administrative and a judicial act by others, other than judges, *is that a quasi-judicial action, contary to an administrative function, is one in which all parties are as a matter of right entitled to notice and to a hearing with the opportunity afforded to present evidence, under judicial forms procedure;* and that no one deprived of such rights is bound by the action taken." *Southview Cemetery Association vs. Hailey*, 199 Ga. at 481 (see cases cited therein) (emphasis added).

The Court in *Southview Cemetery*, than gave the following rules:

"(a) In determining whether or not a proceeding be judicial in character, the question hinges not on whether the parties at interest were in fact given opportunity to be heard since an officer cannot clothe himself with unauthorized judicial powers by mere voluntary compliance with the forms of judicial procedure, but the test is whether the parties at interest had a right under the law to demand a trial in accordance with judicial procedure.

(b) If a person or tribunal has the right under proper delegated authority to act in a judicial capacity, the character of such a judicial procedure when had as prescribed, is not impaired because under the law such tribunal might have had the alternative right to act ex parte without a trial, but refused to exercise such right." Accord *Beckanstin vs. Dougherty County Council*, 215 Ga. 543, 544.

In *Daniels vs. Commissioners of Pilotage*, 147 Ga. 295, 302, the Court held that when the city revokes a license

for cause under the provisions of the ordinance providing that a certain act shall be sufficient cause for the revocation of the license and do not proceed under their general discretionary power, then the determination by the council is the exercise of judicial powers. Accord *Asbell vs. Brunswick*, 80 Ga. 503.

In *Wilson et al vs. Latham*, 277 Ga. 530, the Court ruled that a petitioner cannot go into a court of equity to secure a review of a decision of a municipal body exercising quasi-judicial or judicial functions. See also *Ballard vs. Mayor*, 194 Ga. 489 (1).

In *Thompson vs. Dunn*, 102 Ga. App. 164, the Court applied the foregoing rules set out in the *Southview Cemetery* case, and held that the proceeding before the Civil Service Board of Fulton County are quasi-judicial in character, and a writ of certiorari would lie.

Under Section 14-6004 subsections (c) (1) (2) (3) and (4) of the Atlanta City Charter, the petitioners had a right to a hearing, a right to demand a trial, and a right to present evidence in a judicial procedure where the appellees claimed the appellants violated rules or regulations, or state laws and/or City ordinances.

In *Page vs. City of Hapeville*, 132 Ga. App. 369, a writ of certiorari was the procedure used when the city revoked a liquor license. Similary in the instant case when the liquor license was revoked, a writ of certiorari was the proper remedy.

Therefore, the decision by the License Review Board and the Mayor must be construed as a judicial act so as not to violate equal protection of the law.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

GLENN ZELL
Attorney for Petitioners

Suite 620
66 Luckie Street, N.W.
Atlanta, Georgia 30303
(404) 524-6878

CERTIFICATE OF SERVICE

I, Glenn Zell, hereby certify that I have served a copy of the foregoing Petition on W. Roy Mays, III, Fulton National Bank Building, Suite 2000, Atlanta, Georgia 30303.

This _____ Day of March, 1979.

GLENN ZELL
Attorney for Petitioners

APPENDIX A

55864. B-105

WHAT IT IS, INCORPORATED v. JACKSON.

BELL, Chief Judge.

The appellant's liquor license was revoked by the appellee mayor. Appellant then petitioned for a writ of certiorari for a review of this revocation action. The writ was dismissed on motion of the appellee on the ground that the mayor was exercising only administrative or executive powers and was not exercising any judicial power. *Held:*

The writ of certiorari lies to correct errors committed by any person exercising a judicial function. Code §19-101. It will not be issued to review the exercise by a public officer of administrative or executive functions. *Southeast Greyhound Lines v. Pub. Ser. Comm.*, 181 Ga. 75 (181 SE 834). The Atlanta City Charter states: "All executive and administrative powers of the city are hereby vested in the Mayor and such other administrators, officers, departments and agencies created or continued by this Charter or now or hereafter established by ordinance." (Ga. L. 1973, pp. 2188, 2191). An Atlanta ordinance, Section 14-6004 created a License Review Board and it provides in part:

". . . (c) The functions of the board shall be: . . .

(3) To conduct hearings on any charges which may be brought against any licensee under the police powers of the city where those charges may be the basis for suspension or revocation of the license and to report its findings and recommendations to the mayor.

(d) All hearings before the board shall be administrative and it shall not be required to comply with

the rules of evidence as applied in court trials."

Here the License Review Board conducted a hearing on charges that appellant had violated specified provisions of law at its place of business. The board recommended revocation of the liquor license to the mayor and the latter approved. The appellant contends that this ordinance gave him a right to a trial under judicial procedure and by this fact, the major's action was judicial in character. In determining whether a proceeding is judicial in character, the question hinges not on whether the parties at interest were in fact given an opportunity to be heard, but the test is whether the parties at interest had a right under the law to demand a trial in accordance with judicial procedures. *South View Cemetery Assn. v. Hailey*, 199 Ga. 478 (34 SE 863). The ordinance while it does authorize a hearing does not expressly or by implication grant to the appellant as a matter of right a trial in accordance with judicial procedure. To the contrary, it states that all hearings shall be "administrative" and with no requirement to comply with the rules of evidence. Secondly, the board was not authorized to enter any judgment but only was permitted to make a recommendation to the mayor which was not binding on him. This authority by the board does not fall within the category of a judicial proceeding. Lastly, the mayor, who had only administrative or executive powers, could only approve or disapprove the board's recommendation. Appellant was not as a matter of right entitled to any judicial hearing before him. The action of the mayor was administrative. Thus, the writ of certiorari was correctly dismissed.

Judgment affirmed. Shulman and Birdsong, JJ., concur.

APPENDIX B

Court of Appeals of the State of Georgia

Atlanta, July 5, 1978

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

55864. What It Is, Inc. et al. v. M. H. Jackson, Mayor, etc.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, July 5, 1978

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk

APPENDIX C

34036

SUPREME COURT OF GEORGIA

Atlanta, September 19, 1978

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

What It Is, Inc., et al. v. Maynard H. Jackson, Mayor, et al.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur, except Hall and Hill, JJ., who dissent.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Case No. 55864

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia.

APPENDIX D

Clerk's Office, Supreme Court of Georgia

Atlanta, 10/16/78

DEAR SIR:

The motion for a reconsideration was denied today:

Case No. 34036, What It Is, Inc., et al. v. Jackson, Mayor, et al.

Hall, Hill & Bowles, JJ., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX E

Supreme Court of the United States

No. A-592

WHAT IT IS, INC.,

Petitioner,

v.

MAYNARD JACKSON, MAYOR, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 15, 1979.

S/LEWIS F. POWELL, JR.

Associate Justice of the Supreme Court of the United States

Dated this 27
day of December, 1978.

APPENDIX F

CONSTITUTIONAL PROVISIONS

1. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to any person within its juridsiction the equal protection of the laws."

Supreme Court, U. S.
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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and THE CITY OF ATLANTA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Respondents respectfully pray that a writ of certiorari does not issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above styled action on June 15, 1978.

REASONS FOR DENYING THE WRIT

I.

NO RIGHT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES HAS BEEN DENIED BY THE GEORGIA COURT OF APPEALS WHEN IT DETERMINED THAT THE WRIT OF CERTIORARI WAS NOT AVAILABLE TO REVIEW THE DECISION OF THE MAYOR OF THE CITY OF ATLANTA TO REVOKE THE PETITIONERS' LICENSE TO SELL ALCOHOLIC BEVERAGES.

The petitioner in the case, sub judice, has framed the primary issue in this case as whether or not the failure to provide appellate review for the revocation of a liquor license is a violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Nevertheless, the Court of Appeals in its decision which is the subject of this petition for writ of certiorari did not hold that all means of appellate review were foreclosed to the petitioner in this case to review the decision of the Mayor of the City of Atlanta in revoking the alcoholic beverage license which is the subject of this case.

All that the Court of Appeals of the State of Georgia held was that the writ of certiorari as contained in Ga. Code §19-101, et seq. was not the means of which the Mayor's decision in this case could be reviewed. The Georgia statute which provides for the writ of certiorari asserts:

> "The writ of certiorari shall lie for the correction of errors committed by justices of the peace, corporation courts or councils or any inferior judicatory, or any person exercising judicial powers, including the ordinary, except in cases touching the probate of wills, granting letters testamentary and of administrations; also for the Supreme Court to the Court of Appeals as provided by §2-3708 (Constitution of 1945)." (Emphasis supplied). Ga. Code §19-101.

In intepreting the above quoted section of the Georgia Code the Court of Appeals relied on Georgia law to determine whether or not the decision of the Mayor of the City of Atlanta in this case was an administrative decision or a judicial decision. If such a decision was a judicial decision then it is reviewed by way of the writ of certiorari as provided in Ga. Code §19-101, et seq. See,

Southeastern Greyhound Lines v. Georgia Service Commission, 185 Ga. 75, 89-90 (1935) cited with approval in Cantrell v. Board of Trustees, etc., 135 Ga. App. 445 (1975). Conversely, if such decision of the Mayor of the City of Atlanta was an executive or administrative decision, then the decision of the Mayor could not be reviewed by the writ of certiorari statute, supra. In determining that the decision of the Mayor in this case was not a judicial decision the Court determined that the writ of certiorari was not the means for review. Nevertheless, THIS DOES NOT FORECLOSE THE PETITIONER IN THIS CASE FROM SEEKING REVIEW OF THE DECISION OF THE MAYOR BY WAY OF A PETITION IN EQUITY OR THE GEORGIA DECLARATORY JUDGMENT ACT. See Ga. Code §81A-165, et seq. and Ga. Code §110-1101, et seq.

Indeed, in Blackmon v. Alexander, 233 Ga. 832 (1975), the Georgia Supreme Court determined that,

> "Denial and cancellation of liquor licenses are actions of a public official subject to court review. In the absence of some remedial review prescribed by law, equity is available to review alleged abuses of discretion by the administrative licensing authority. (Emphasis supplied). Blackmon, supra, 835.

Thus, the question here is not whether all means for reviewing the Mayor's decision in this case has been foreclosed to the petitioner but rather the proper means by which such decision may be reviewed. Accordingly, the petitioner's reliance upon criminal cases in this civil case for the proposition that where all means of review of a judicial decision are foreclosed that he has been denied equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution is in error.

CONCLUSION

Therefore, the petitioner has improperly framed the issues in this petition for writ of certiorari to the Georgia Court of Appeals, since the decision in this case may be reviewed by a petition in equity and pursuant to the Georgia Declaratory Judgment statute, supra. The petition for certiorari to the Court of Appeals of the State of Georgia should therefore be denied.

Respectfully submitted,

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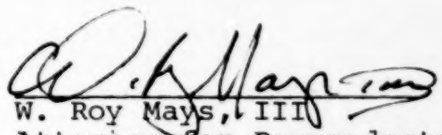
CERTIFICATE OF SERVICE

I, W. Roy Mays, III, hereby certify that I have served a copy of the foregoing Brief on Glenn Zell, Suite 620, 66 Luckie Street, N.W., Atlanta, Georgia 30303.

This 6th day of June, 1979.



W. Roy Mays, III
Attorney for Respondents